No. 12553

IN THE

United States
Court of Appeals
For the Ninth Circuit

ARNOLD ENRIQUEZ,
Appellant,

vs

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
District of Arizona

BRIEF FOR APPELLEE

FRANK E. FLYNN,
United States Attorney

E. R. THURMAN,
Assistant U. S. Attorney
Attorney for Appellee.

McGREW COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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STATEMENT OF PLEADINGS AND FACTS

This is an appeal by the appellant from a judgment of conviction rendered against him upon the verdict of a jury in the United States District Court for the District of Arizona, after a trial before the Honorable Dave W. Ling, District Judge, and a jury, and entered against the appellant on May 15, 1950. (T.R. 52, 53).

The Grand Jury returned an indictment on June 16, 1949 against appelant and five others, namely: Arturo C. Leyvas, Ray C. Leyvas, Connie Duarte, Arturo E.

Jerez and Joe Martinez. (1.R. 2). The indictment contained 78 counts, the first 77 counts charging substantive offenses in violation of 21 U.S.C.A. Sec. 174 and 26 U.S.C.A. Sec. 2554(a), nine of which related specifically to this appellant, Arnold Enriquez; and count 78 charging conspiracy to violate 18 U.S.C.A. Sec. 88 (1946 Ed.) and 18 U.S.C.A. Sec. 371. (T.R.2-37).

Appellant's co-defendants pleaded guilty, (T.R. 38-61). The trial of this appellant came on regularly on April 26, 1950, (T.R. 39) and on April 28, 1950, the jury returned their verdict, finding the appellant, Arnold Enriquiz, guilty as charged in Count 78 of the Indictment. (T.R. 45). At the close of the Government's case, the Court, on motion of appellant, entered a judgement of acquittal on all of the substantive counts, i.e.: Nos. 52, 53, 54, 64, 65, 66, 67, 68 and 69. (T.R. 53, 54). The Court denied a motion for judgment of acquittal on the conspiracy count 78. (T.R. 255).

The appellant's brief correctly shows the jurisdiction of the District Court and of this Court. (App. B. 1, 2).

This appeal challenges the sufficiency of the evidence to support the verdict and raises the question as to whether or not the Court erred in the admission of certain evidence, as set forth in appellant's Specifications of Errors Nos. I, II and III. (App. B. 10, 11).

The evidence showed that from on or about the 16th day of February, 1948, up to and including the 15th day of February, 1949, in Phoenix and vicinity, Government agents and informers made purchases of narcotics consisting of prepared smoking opium, yen shee, morphine hydrochloride and herroin hydrochloride directly from the co-conspirators of the appellant, there being 23 distinct transactions alleged in the indictment. (T. R. 94, 107, 110, 116, 118, 121, 123, 126, 143, 148, 152, 154, 155, 163, 170, 183 and 213).

The evidence showed that the Pan-American Club (formerly Pirata's Inn), located on the corner of 16th and Washington Streets, Phoenix, Arizona, was frequented by appellant and the co-defendants (T.R. 140, 142, 148, 147, 151, 172, 173, 174); and that appellant,Arnold Enriquez, who was also known as "Pirata," at one time had a series 6 license for Pirata's Inn, but that following his arrest, the license was transferred. (T.R. 291).

It was brought out in the evidence that the residence of appellant was 2022 E. Moreland, Phoenix, Arizona; that the green Cadillac car at all times mentioned was registered in the name of appellant (T.R. 103, 105); that the residence of two of the co-conspirators, Arturo Leyvas and Connie Duarte was 1030 E. Moreland, Phoenix, Arizona (T.R. 135, 136); and that appellant's green Cadillac car was frequently parked in front of 1030 E. Moreland (T.R. 119, 120, 129, 225).

It is shown in the Reporter's Transcript that plaintiff in open Court said: "We don't know whether Cobis will be here or not, so we can't use it." (T.R. 122). Appellant was asked on cross-examination, "Do you know where Charlie Cobos is now?", to which question appellant replied, "No, sir." (T.R. 287).

The facts show that on February 15, 1949, the day of arrest of all defendants, appellant's Cadillac car was parked in front of the home of Arturo Leyvas at 1030 E. Moreland, and the car, driven by appellant, was seen to depart from there about 2:45 a.m., and that Joe Martinez, one of the conspirators, and Mike Sandoval, a Government witness, were in the car at that time. (T.R. 129).

It was brought out in the evidence (T.R. 79,80) through the witness Viron A. Elkins that co-conspirator, Arturo Jerez (also known as "Colimo") drove up

to Elkins' real-estate office in Tempe in a green Cadillac sedan, identified as belonging to appelant, in November of 1948, and asked Elkins if he wanted to buy some smoking opium and, among other things Jerez told Elkins that there were two other parties in with hime on the stuff, naming, Art Leyvas and "Pirata." Elkins further testified (T.R. 86) that Jerez ("Colimo") delivered opium to him in a green Cadillac sedan on July 22, 1948, and this transaction was witnessed by Robert W. Lorenz, Narcotic Agent, who had concealed himself in a nearby hiding place. (T.R. 99, 100, 106). Narcotic Agent, Earl A. Smith, testified that following the delivery of opium to Elkins on this same date, July 22, 1948, he saw the Cadillac belonging to appellant being driven by co-conspirator Arturo Jerez (Colimo) park in front of the small cafe east of Pirata's Inn and saw Jerez enter the cafe and return to the car and drive to the home of co-conspirator Ray Leyvas. It was further brought out in the testimony of Agent Smith that on August 19, 1948, during the time a transaction was being made between Jerez and Elkins, Smith saw appellant's cadillac sedan driven by Joe Martinez parked in front of the cafe and saw Martinez go into the cafe at the same time Jerez was in the cafe. (T.R. 221, 222).

The testimony of Okla W. Johnson, Government Agent, (T.R. 147, 148) brings out the fact that on October 10, 1948, appellant, accompanied by Colimo, came into the Pan-American Club and following a conversation between Colimo, Art Leyvas and appellant, a transaction was made outside the building.

The evidence further shows (T.R. 149, 150, 151) that on October 29, 1948, after considerable conversation at the Club between Jerez (Colimo) and Agent Johnson concerning the purchase of narcotics, later that same evening at the Club and while co-conspirators, Martinez

and Leyvas, were present, appellant "Pirata" came in and Johnson was called by Frank Colbert who told him Art Leyvas was ready to sell him some opium and that he should come with him right then to make the deal. When Johnson went back to check out of the poker game, appellant came up to him and said, "Go ahead, check out, Johnnie, I will take your place," urging him out of the game. Johnson left the club and the transaction followed.

The evidence further shows that on January 13, 1949, the witness Johnson went to the Pan-American Club and requested the Manager, Charlie Pacheco, to call appellant, Arnold Enriquez, which he did; and about two hours later appellant and Joe Martinez came into the club and talked to Johnson. Following Johnson's conversation with appellant concerning the urgent necessity of obtaining some stuff right away for his customers, appellant said, "There isn't anything in town, and you will not be able to get anything until Art gets back." and appellant further said: "I'd like to help you, but there isn't anything I can do until the stuff gets here." Johnson discussed his difficulties in obtaining the narcotics further with appellant, after which appellant left the club. (T.R. 172, 173, 174). After Johnson had finished two games of shuffleboard with Joe Martinez, appellant came back in and he said, "Johnnie, I know that Art is going to be back tomorrow night. If you will be here between 5:00 and 5:30, I will see to it that Art meets you right here." On the following day when Johnson went to the Club at 5:00 o'clock, he found Jerez (Colimo) was there. Colimo asked Johnson to go with him and when Johnson refused and said he was waiting for Art, Colimo said, "Well, Art is tied up and Arnold told me to come down." Johnson explained to Colimo why he didn't care to deal with him anymore and would only deal with

Art. Later on that afternoon, Arturo Leyvas came to the Club and Johnson explained to him that he did not want to deal with Colimo and Art Jerez said: "Arnold told me to contact you, but I was busy, and Colimo came down . . ." Later on that evening a transaction was made. (T.R. 174, 175, 176).

It was brought out in the evidence (T.R. 180) that on January 29, 1949, witness Okla W. Johnson, in accordeance with a telephone conversation with co-conspirator Joe Martinez (T.R. 181), the said Martinez came to the Club and that the witness and Martinez had a conversation wherein the witness informed Joe Martinez that he was out of stuff and that he was trying to get ahold of some and that he thought that he'd call him and see what he could tell him and Martinez said, "Don't you know all of those fellows are in jail in California?" (T.R. 182).

The facts show that on or about January 21, 1949, the witness Mike Sandoval saw appellant at Arturo Leyvas' house at which time, Arturo Leyvas, Connie Duarte, Colimo and Martinez were smoking opium (T.R. 199); and that on or about February 25, 1949 (T.R. 285, 286) Sandoval, Arthur Leyvas, Arturo E. Jerez (Colimo) and Manuel Gomez went to Los Angeles to a prize-fight with appellant in appellant's car.

The evidence further shows through the testimony of Government witness Frank Y. Colbert (T.R. 217) that on the night of the prize-fight in Phoenix, January 12, 1949, appellant and Joe Martinez were there together and Colbert asked appellant if it would be possible to get opium that night and appellant told him that "there was nothing in town, that Art Leyvas would be back Friday and I would have to wait until he got back."

It was brought out in the evidence through the witness, Jesse J. Harris, Office Manager for the Mountain

States Telephone & Telegraph Company, Phoenix, Arizona, that the records showed Phoenix phone No. 4-3914 was listed in the name of Arnold Enriquez at 2022 East Moreland Street and that Phone No. 9-6327 was listed to Connie Duarte, non-listing, at 1030 East Moreland Street. (T.R. 246, 247).

The facts also show (T.R. 226) that on January 15, 1949, Narcotic Agent Earl A. Smith saw Charles Cobos, who was assisting him in the investigation, dial telephone No. 4-3914 at a drugstore located at the corner of Henshaw and South Central Avenue. After the telephone call, Cobos was searched and furnished with $50 and said Cobos went to his home at 1018 South First Street and that shortly thereafter on said date, coconspirator, Joe Martinez, and Ernest Hayworth, driving a black Cadillac sedan, stopped in front of the home of Cobos and Agent Smith saw Martinez get out of this car, knock on the door, and Cobos came out into the yard, and after a conversation, Joe Martinez handed something to Cobos and immedately thereafter Cobos turned over to the said Earl A. Smith and Agent Lorenz a jar of opium. (T.R. 227).

Testimony of the witness Smith (T.R. 228, 229) further shows that on February 6, 1949, he again saw Charles Cobos dial the telephone No. 4-3914 from the same drug store and he heard Cobos talk to someone he called "Pirata" in Spanish. Following the phone call, Smith searched Cobos and furnished him with $50 and shortly after that, he saw joe Martinez drive up in front of Cobos' house at 1018 South First Street, in a 1937 Chevrolet sedan, get out and knock on Mr. Cobo's door. Then Cobos and Martinez entered this car where they stayed for about 10 minutes. After coconspirator Martinez drove off, Cobos walked down the street, followed by Agent Lorenz, and Cobos turned

over to Smith a jar of smoking opium; and then witness Smith drove rapidly across town to the vicinity of 2022 East Moreland Street, home of appellant, and saw Martinez parking the said Chevrolet car in front and enter the home of appellant; and that this happened immediately after the narcotics had been delivered by Martinez to Cobos and turned over to the witness.

Testimony of Earl A. Smith (T.R. 230, 231) further shows that he again saw Cobos dial telephone No. 4-3914 on February 8, 1949, heard him talk in Spanish and hang up; and then saw him dial telephone No. 9-6327, known listing of co-conspirator Connie Duarte, at which time, Cobos said in English, "Let me speak to Pirata." He then carried on a conversation in which the name "Pirata" was mentioned several times. Smith then searched Cobos and furnished him with $50. He then saw appellant, with Arturo Leyvas sitting beside him, drive up to Cobos' house in a '47 Chevrolet automobile and saw Cobos come out of his house, get in the car with appellant and Leyvas and talk for about 20 minutes. Agent Smith then followed appellant and Leyvas back to 1030 East Moreland Street where they parked the said Chevrolet car in the driveway. In a short time, he saw Joe Martinez come out and get in this same car and that he, Agent Smith, drove rapidly back to 1018 South First Street and when he arrived there, saw Joe Martinez in this same car with Charlie Cobos. In a few minutes, Cobos got out of the automobile, was followed by Agent Lorenz and the witnes met Charlie Cobos who turned over to him a jar of opium.

The record further shows (T.R. 240, 241) that the Government, over the objection of defendant, introduced into evidence a record of prior conviction of the appellant for violation of the narcotic laws of the United States, dated at Tucson, Arizona, March 5, 1945.

The record also shows that appellant elected not to commence serving his sentence. (T.R. 56).

QUESTIONS PRESENTED

1. The evidence is not sufficient to sustain the verdict.
2. The Court erred in admitting evidenuce of the record of a prior conviction.
3. The Court erred in the admission of hearsay evidence.

SUMMARY OF ARGUMENT

In answering appelant's arguments upon the Specifications of Error, we will discuss the points listed thereunder in the order in which they are presented in appellant's brief.

ARGUMENT I. (App. B. 11-22)

THE FACTS ARE NOT SUFFICIENT TO SUPPORT THE VERDICT.

Specification of Error No. 1.—"The lower court erred in refusing to grant appellant's motion for judgment of acquittal on Count 78; erred in denying appellant's motion for a new trial; and erred in entering judgment on the verdict; for the evidence was insufficient to sustain the conviction."

Argument I. is divided by appelant into the following parts:

"A. Mere association with alleged coconspirators does not establish guilt.

B. Use by alleged coconspirators of appellant's automobile does not establish guilt.

C. Knowledge by appellant that alleged coconspirators violated the law did not make appellant a conspirator with them.

1. There was no evidence that appellant was a confederate of the codefendants.

2. The evidence shows that if appellant participated in unlawful activities he did so as an agent for the government and hence is not guilty of conspiring with the codefendants.

D. Telephone calls to the home of appellant and subsequent meetings between a government informer and one of appellant's codefendants had no probative value in establishing appellant's supposed guilt."

Replying to the argument that the facts are not sufficient to support the verdict, appellee wishes to point out that the transcript of the evidence must be carefully considered in its entirety. If, from a perusal of the evidence, the only fact found therein was that the appellant merely associated with the alleged conspirators or that the co-conspirators used appellant's automobile in furtherance of their illegal transactions, or that appellant merely had knowledge that the alleged conspirators were violating the law, or that the appellant participated in the unlawful activities as an agent for the Government—it might be said on the specific acts taken alone that the appellant's position might be correct. However, from reading the evidence, we find that appellant, who had been convicted of a prior offense in violation of the narcotic laws of the United States and sentenced for a term of two years and six months on March 5, 1945 (T.R. 240, 241), can be presumed to have spent some time in confinement; and since the investigation of this case continued over a period of a year, commencing from on or about February 27, 1948 (T.R. 82), it would appear that appellant had not been out of jail too long before he was associating with the codefendants and co-conspirators in this case; and, in addition thereto, was loaning his green Cadillac sedan to them and having conversations with them at the Pan-

American Club (formerly Pirata's Inn); and it appears from the record that his accociation was more than casual in that he conferred with the co-conspirators and immediately thereafter opium would be delivered. There were also the telephone calls by Cobos to appellant's telephone number to a person called "Pirata", which was appellant's nickname, and a prompt delivery of opium after the said telephone calls by members of the conspiracy; and the fact that appellant was usually at the Club when the transactions were entered into for the purchase and delivery of opium; and further that appeallant made arrangements for meetings between the Government's agnts and Art Leyvas which resulted in purchases and deliveries of opium; and the further fact that appelant was seen riding in an automobile with one of the co-conspirators immediately prior to the sale and delivery of narcotics by the co-conspirators; that appellant's Cadillac car was observed parked in front of the home of Arturo Leyvas and Connie Duarte, two of the co-conspirators; that on several occasions, appellant's green Cadillac car was observed being used by the co-conspirators to deliver opium to the Government informers; and gain, the evidence shows that subsequent to a telephone call by Charlie Cobos to appellant's telephone number, co-conspirator, Joe Martinez delivered opium to the said Cobos and that the said Joe Martinez, who was at that time driving a black Cadillac sedan, immediately after the transaction, parked said car in front of appellant's home and Martinez was seen to enter the front door of the premises. (T.R. 225-230).

The evidence is overwhelming that not only did the appellant have knowledge of the conspiracy but he took an active part in furtherance thereof, as reflected by the statement of facts of this brief.

The appellant, on page 7 (footnote 7) of his brief, states, in substance, that appelant's car was connected with narcotic traffic only twice in a period of a year. From the transcript of the evidence, we find that in addition to the two instances when agents Smith and Lorenz were eye-witnesses to two deliveries of opium made in appellant's car (T.R. 100, 221), that on two other occasions, these agents saw appelant's car being driven by co-conspirators to facilitate two other separate transactions (T.R. 221, 225); and the evidence further reveals that on six different occasions, on the days transactions were negotiated and immediately prior to and/or after each transaction, appellant was in contact with the co-conspirators either in person or by phone. (T.R. 147, 148, 151, 172-174, 226-231).

Appellant claims (App. B. 18): "The evidence shows that if appellant participated in unlawful activities he did so as an agent for the government and hence is not guilty of conspiring with the codefendants."

From a reading of the transcript of evidence, no foundation for any such assertion is found in the entire transcript of evidence and we are unable to follow appellant's theory on this point.

Appelant states (App. B. 20): "Telephone calls to the home of appellant and subsequent meetings between a government informer and one of appellant's codefendants had no probative value in establishing appellant's supposed guilt."

He bases his argument upon the discrepancy as to the time the witness Smith claims he received the exhibits and the time they were delivred to him by the informer Cobos. It may be that witness Smith was confused by the time element, but a reading of his evidence (T.R. 226, 227, 229) brings forth the fact that he told each step as it occurred in chronological order and the exhibits

were handed to him by Cobos subsequent to the telephone calls and the deliveries and the error in time in no way impeaches or detracts from Mr. Smith's testimony. Surely, the jury was justified in infering from the said testimony that appellant took an active part in the delivery of the said narcotics.

Appellant (App. B. 22) calls attention to the fact that informer Cobos was not called by the Government to testify and asks this Court under the authority of *Morei v. U. S.*, 127 F2d 827, to weigh every inference and conclusion against the contention of the Government in that phase of the case. It will be noticed (T.R. 122) that the Government attorney made this statement: "We don't know whether Cobos will be here or not, so we can't use it"; and again in the testimony of the appellant (T.R. 287) the question was asked of him, "Do you know where Charlie Cobos is now?" to which question, appellant answered, "No, sir." Since appellant has seen fit to insert the element into his brief, we believe that we should answer it, and, in this regard, we state that this Court has the right to conclude from the record in this case that the Government would have produced Cobos had it been possible. It must be kept in mind that there was a period of one year, to-wit, from January 15, 1949 (T.R. 226) to April 26, 1950 (T.R. 61), between the transactions of Mr. Cobos and the date of the trial.

ARGUMENT II. (App. B., pages 22-27)

THE LOWER COURT ERRED IN PERMITTING THE GOVERNMENT TO INTRODUCE INTO EVIDENCE A RECORD OF A PRIOR CONVICTION.

Specification of Error No. 2—"The lower court erred in admitting into evidence government's exhibit No. 29, which is a certified copy of a judgment of the prior

conviction of appellant, dated March 5, 1945, based on an indictment charging him with violation of laws relating to narcotics (T.R. 240). Appellant objected to its introduction on the grounds that it was "improper and immaterial; incompetent. It goes to the offenses which are not in issue at this time. It goes to impeach the defendant who has not at this time taken the witness stand" and it was too remote to be admissible on the question of intent (T.R. 239."

In support of the introduction of the record of a prior convition of the appellant, we cite the following:

"Conspiracy is essentially a crime of intent."

Brittain vs. U. S., 60 F2d 772, 773
Mackreth vs. U. S., 103 F2d 495, 496
Landon vs. U. S., 299 Fed. 75, 78
Pelz vs. U. S., 54 Fed. ,2d 1001, 1005.

Proof of cinspiracy to violate the Federal law may be by circumstantial evidence, oftentimes by overt acts alone.

Marino vs. U. S., 91 F2d 691-698, (9th Cir.)

This Court held in the above case that proof of a conspiracy may be by circumstantial evidence, oftentimes by overt acts alone, in which case much is left to the discretion of the trial court. In such cases great latitude is allowed and appelate courts will not reverse a case unless practical injustice has been done by the admission of irrelevant testimony.

Certainly, there is sufficient evidence in this case to support the conviction of the appellant under the rule as laid down in *Marino vs. U. S.* supra. The appellant on page 14 of his brief (Footnote 11), argues that the case of *U. S. vs. Falcone,* 311 U. S. 205, necessarily, by implication, overrules that portion of *Marino v. U. S.,* supra, relating to appelant, Gullo, wherein (page 699 of the opinion), it is set forth that Gullo permitted his premises to be used for storage and the re-canning of

the alcohol, and that such permission aided the purpose of the conspiracy and that the jury could properly infer knowledge.

In reading the Falcone case (pages 210, 211) it will be found that the case decided but one point and that was if one who sells materials knowing only that they are intended for use or will be used in the illicit production of distilled spirits but not knowing of the conspiracy to commit the crime is not chargeable as coconspirator. It is apparent that this does not, either by implication or otherwise, over-rule any portion of *Marino v. U. S.* (supra). It is obvious from reading the testimony in instant case that the appellant had more than mere knowledge of the conspiracy; in fact, he actually participated in it from beginning of the investigation to the end.

In further support of the introduction of the record of appellant's prior conviction, we cite the case of *Van Gesner v. U. S. Williamson v. same,* 153 Fed. Reporter 46 (9th Cir.) This case holds, in substance, that where the intent of the party is matter in issue, it has always been deemed allowable to introduce evidence of other acts and doings of the party of a kindred character in order to illustrate or establish his intent or motive in the particular act directly in judgment, provided that the Court, both in admitting it and instructions to the jury, limits the evidence to the question of motive (page 56 of the opinion). This particular case was appealed to the Supreme Court of the United States under the name of *Williamson vs. U. S.,* 207 U. S. 425. The Supreme Court sustained the lower Court (page 451 of the opinion) in the following language:

> "The contention that the proof on the subject just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment and consequently

must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof."

An examination of the trial court's instruction to the jury in the instant case on evidence of a former conviction (T. R. 301, 302) is as follows.

"Now, evidence of a former conviction of the defendant for a similar offense was introduced in evidence. This was for a very limited purpose. However, I will read you an instruction in connection with that.

"The fact that the accused may have committed an offense at some time is not evidence that at a later time the accused committed the offense charged in the indictment, even though both offenses be of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore be considered in determining whether the accused did the acts charged in the indictment. Nor may such evidence be considered for any other purpose, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the acts charged in the indictment.

"If the jury should find from the other evidence in (291) the case that the accused did the acts charged in the indictment, then the jury may consider evidence as to an alleged earlier offense in determining the state of mind or intent with which the accused did the acts charged in the indictment. And, where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the indictment, the accused acted wilfully, and not because of mistake or inadvertance or other innocent reason."

Certainly, from a reading of the case of *Williams vs.* U. S., supra, with the instruction above set forth, it is hardly possible to conceive how the evidence could have been prejudicial to appellant, for the court expressly warns the jury that the evidence of the prior conviction could in no way be considered until they had first determined from the other evidence that the appellant did the acts charged in the indictment and that the jury could only draw an inference therefrom that the appellant in doing the acts charged in the indictment acted wilfully and not because of mistake or inadvertence or other innocent reason.

It will be noted that at the time of the introduction of the said prior conviction (T.R. 239), the Court said: "Well, the general rule is that evidence of other offenses is admissiable on the question of intent." * * * "It happened five years ago. It will be received and the Court will limit the effect by proper instruction." Certainly the court was careful at the time of the admissibility of the exhibit and in its instructions. Other cases that follow the same rule are:

U. S. Bollenbach, 147 F2d 199 (2nd Cir.)
Boyd v. U. S., 1420 U. S. 450
Marino v. U. S., 91 F2d 691 (9th Cir.)
Hatem v. U. S., 42 F2d 40 (4th Cir.)
Orloff v. U. S., 153 F2d 292 (6th Cir.)

The case of *Orloff v. U. S.,* supra, is a prosecution for conspiracy to violate Internal Revenue laws by aiding a transportation of tax paid liquor with intent to defraud the United States, and admitted testimony that accused was engaged in illicit liquor business 15 years before the period covered by the indictment and no limit is placed upon the power of the court to admit

evidence of prior similar transactions where a specific intent to defraud is an element of the offense.

Kettenbach v. U. S., 202 Fed. 377 (9th Cir.)
Sargent v. U. S., 35 F2d 344 (9th Cir.)
Gowling v. U. S., 64 F2d 796 (6th Cir.)

We quote from the opinion in the case of *Gowling v. U. S.,* supra, (page 798) as follows:

> Fourth. "We do not think that it was reversible error to permit the district attorney to cross-examine appellant touching either his former conviction under the Harrison Anti-Narcotic Act or his connection with Charles Frank. Appellant made no contention that Chatham and Caldwell, or either of them, placed the opium in his vest pocket, or that these officers did not find it there, but testified that he could not account for its presence; that it was not there when he left the vest in the room, and it was not placed there by him nor with his knowledge, and he insisted that the element of criminal intent was therefore lacking. He testified that he was not a drug addict; that he did not smoke opium; that he did not know that Mrs. Bussey smoked opium, and he explained his presence at the Bussey home by saying that he went there with his wife to arrange the adoption of the little girl; that his brief case, which was found, contained a shaving outfit; and that he had removed his coat and vest for convenience while shaving. His testimony raised the principal issue, that is, of criminal intent."

We have set out the above quotation for the reason that we believe that the facts in the instant case are similar in that the appellant has denied the associaion with the co-conspirators, denied that he had any knowledge of the conspiracy, denied that he ever delivered any narcotics to Charlie Cobos, denied having ever sold narcotics to anyone and denied that he in any way participated in the conspiracy. (T.R. 259 et seq.).

Certainly, from the evidence in this case and the position taken by the appellant in his denials, the principal issue was raised, that is, of criminal intent; and we believe that the Court committed no error in admitting the prior conviction record for that purpose as indicated by its instruction to the jury.

The appellant in support of his position on this point (pages 23, 24, 25 of his brief) cites several cases and we believe that it is pertinent to analyze most of them briefly.

The case of *Terry v. U. S.,* 7 F 2d 28, cited by appellant, shows that there was no instruction as to the purpose for the introduction of the prior act in any way limiting the purpose of the evidence and further there was no other evidence tending to connect the defendant with the conspiracy. This differs materially from the instant case, for the record of appellant's prior conviction was not introduced in the evidence until appellant had been connected with the conspiracy by other evidence; and the same can be said of *Crowley v. United States,* 8 F2d 118 (A. B. page 24). The case of *Tedesco v. United States,* 118 F2d 737 (9th Cir.) cited by the appellant, seems to be in line with the government's position in that the case holds that where evidence of a separate and independent offense is admitted in order to prove defendant's intent, the jury should be instructed as to the probative extent of the evidence so admitted and on page 740 of the opinion cites the case of *Williamson v. U. S.,* 207 U. S. 425, 451, with approval. The case of *Henderson v. United States,* 143 F2d 681 (9th Cir.), cited by appellant, holds that plain, clear and conclusive evidence is required to establish other similar offenses as bearing on accused's intent and affirmed the trial court for the reason that the court carefully instructed the jury that the evidence

was not to be considered by them for a purpose other than the question of defendant's intent, and cites the case of *Boyd vs. U. S.,* supra, with approval. There can certainly be no question as to appellant's prior offense since it was made positive by the conviction. The other cases cited by appellant on this point are based upon different fact situations from the facts in the instant case and, therefore, cannot be held to govern the ruling of the trial court in the case now on appeal.

We feel that the court committed no error in admitting the record of appelant's prior conviction in evidence for the purpose for which it was admitted.

ARGUMENT III. (App. Brief, pages 27-30)

THE LOWER COURT ERRED IN ADMITTING HEARSAY EVIDENCE.

Specification of Error No. 3—"The Court erred in denying appellant's motion to strike the testimony of the government witness to the effect that he heard a government informer, after dialing appellant's telephon number, "talk to someone which he called 'Pirata' (appellant) in Spanish" (T.R. 228) * * *.

The appellant claims that the court committeed error in admitting the testimony of the Government witness Earl A. Smith (T.R. 226, 230) with respect to the telephone calls made in his presence by Cobos at the time Cobos dialed appelant's telephone number and the purported conversation that then took place.

The only conversation testified to by the witness was that he heard Cobos use Arnold Enriquez' nickname, "Pirata." This evidence, coupled with the fact that soon after the telephone calls and conversations, deliveries of opium were made and the further fact that witness Smith testified that after one of said calls, he saw appellant and co-conspirator Arturo Leyvas meet

Cobos at his house, showed, and the jury could infer, as it undoubtedly did, that appellant was instrumental in the delivery of narcotics and in contact with the co-conspirators in the case.

In support of the trial court's ruling on this evidence, we cite the following cases: *Blakeslee v. U. S.,* 32 F2d 15, (1st Cir.), which holds that evidence in conspiracy prosecution of telephone calls between defendants without identifying persons speaking was held competent. the case of *Wood v. U. S.,* 84 F2d, 749, (5th Cir.), holds that in prosecution for conspiracy to import alcohol, records of telephone calls from rooms and offices occupied by defendant were admissible to show constant communication between defendant and co-conspirators in corroboration of other testimony, although the nature of conversation was not shown. In *Takahashi v. Hecht Co.,* 64 F2d 710, (D.C.), on page 712 of the opinion it is said:

> "The admissibility of testimony of a bystander who relates one side of a telephone conversation is governed by the same general rules of evidence which govern the admission of oral statements made in ordinary conversation."

and further holds (page 712 of the opinion):

> "Where it is established either directly or by circumstantial evidence that a telephone conversation took place between individuals who could be bound if the same had been carried on face to face, it is competent for a bystander to relate that part of the conversation which he heard, provided that such statements are competent evidence."

We believe that the Court properly admitted the testimony of witness Earl A. Smith with respect to the above evidence and that the Court committed no error therein.

CONCLUSION

We, therefore, respectfully submit that the appellant was afforded a fair and impartial trial and the verdict and judgment should be affirmed.

Respectfully submitted,

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